

1 H.265

2 Introduced by Representatives Pugh of South Burlington, Haas of Rochester,  
3 McFaun of Barre Town, Troiano of Stannard, and Wood of  
4 Waterbury

5 Referred to Committee on

6 Date:

7 Subject: Human services; Long-Term Care Ombudsman; adult protective  
8 services

9 Statement of purpose of bill as introduced: This bill proposes to update the  
10 Long-Term Care Ombudsman statutes to conform to the federal Older  
11 Americans Act and related regulations.

12 An act relating to the State Long-Term Care Ombudsman

13 It is hereby enacted by the General Assembly of the State of Vermont:

14 Sec. 1. 33 V.S.A. chapter 75 is amended to read:

15 CHAPTER 75. STATE LONG-TERM CARE OMBUDSMAN

16 § 7501. DEFINITIONS

17 As used in this chapter:

18 (1) “Long-term care” means ~~care or~~ services *and supports* received by  
19 an individual in a long-term care facility or provided to an individual ~~under the~~

1 ~~long-term care Medicaid Section 1115 waiver~~ through the Choices for Care  
2 program contained within Vermont's Global Commitment to Health Section  
3 1115 Medicaid demonstration.

4 (2) "Long-term care facility" means a residential care home or, an  
5 assisted living residence or nursing home as defined by section 7102 of this  
6 title, or any other similar adult care home that is licensed or required to be  
7 licensed pursuant to chapter 71 of this title.

8 (3) "Office" means the Office of the State Long-Term Care  
9 Ombudsman.

10 (4) "Older person" means an individual who is 60 years of age or older.

11 ~~(5) "Ombudsman" means an individual who intervenes on behalf of a~~  
12 ~~private individual to resolve complaints and, in this chapter, refers to any~~  
13 ~~person or organization designated by the State Ombudsman as part of the~~  
14 ~~Office of the State Long-Term Care Ombudsman, in accordance with the Older~~  
15 ~~Americans Act. "Representatives of the Office of the State Long-Term Care~~  
16 ~~Ombudsman" or "representatives of the Office" means the employees or~~  
17 ~~volunteers designated by the State Long-Term Care Ombudsman to carry out~~  
18 ~~the duties of the Office, regardless of whether supervision is provided by the~~  
19 ~~Ombudsman, his or her designee, or an agency hosting a local Ombudsman~~  
20 ~~entity designated by the Ombudsman.~~

21 (6) "Resident" means an older person or an individual with disabilities

1 who is 18 years of age or older who resides in a long-term care facility or  
2 receives long-term care services through the Choices for Care program  
3 contained within Vermont’s Global Commitment to Health Section 1115  
4 Medicaid demonstration.

5 (7) “Resident representative” means any of the following:

6 (A) an individual chosen by the resident to act on his or her behalf in  
7 order to support the resident with decision making; accessing the resident’s  
8 own medical, social, or other personal information; managing financial  
9 matters; receiving notifications; or a combination of these;

(B) a person authorized by State or federal law, including an agent  
under a power of attorney or advance directive, a representative payee, or  
another fiduciary, to act on the resident’s behalf to support the resident with  
decision making; accessing the resident’s own medical, social, or other  
personal information; managing financial matters; receiving notifications; or a  
combination of these;

10 (C) legal representative, as used in Section 712 of the federal Older  
11 Americans Act, 42 U.S.C. § 3058g; or

12 (D) the resident’s court-appointed guardian or conservator.

13 (8) “State Long-Term Care Ombudsman” or “Ombudsman” means the  
14 individual selected from among individuals with expertise and experience in  
15 the fields of long-term care and advocacy who heads the Office of the State

1 Long-Term Care Ombudsman and is responsible personally, or through  
2 representatives of the Office, to fulfill the functions, responsibilities, and  
3 duties set forth in 45 C.F.R. §§ 1324.13 and 1324.19.

4 (9) “Willful interference” means an individual’s action taken or failure to  
5 act in an intentional attempt to prevent, interfere with, or impede the  
6 Ombudsman or a representative of the Office from performing any of his or  
7 her functions, responsibilities, or duties.

8 § 7502. OFFICE OF THE LONG-TERM CARE OMBUDSMAN

9 ESTABLISHED

10 The Office of the Long-Term Care Ombudsman is established in the  
11 Department of Disabilities, Aging, and Independent Living to represent the  
12 interests of older persons and persons with disabilities under ~~the age of 60~~  
13 years of age receiving long-term care in accordance with the provisions of this  
14 chapter and the Older Americans Act. ~~For the purposes of this section, long-~~  
15 ~~term care facilities shall include facilities in which placements are made by,~~  
16 ~~and facilities funded through, the Department of Disabilities, Aging, and~~  
17 ~~Independent Living.~~ Subject to the provisions of 42 U.S.C. § 3058g, the  
18 Department may operate the Office and carry out the program directly or by  
19 contract or other arrangement with any public agency or nonprofit private  
20 organization. The Office shall be headed by ~~an individual, to be known as the~~  
21 ~~State Long-Term Care Ombudsman, who shall be selected from among~~

1 ~~individuals with expertise and experience in the fields of long-term care and~~  
2 ~~advocacy.~~

3 § 7503. RESPONSIBILITIES OF THE OFFICE

4 The Office shall:

5 \* \* \*

6 (6) ~~establish by rule~~ policies and procedures for protecting the  
7 confidentiality of its clients as required by the Older Americans Act;

8 (7) ~~establish by rule~~ qualifications and training for ombudsmen the  
9 Ombudsman and representatives of the Office, monitor their performance, and  
10 ~~establish by rule~~ procedures for certifying staff and volunteer ombudsmen  
11 volunteers;

12 \* \* \*

13 § 7504. AUTHORITY OF THE STATE OMBUDSMAN AND  
14 REPRESENTATIVES OF THE OFFICE

15 (a)(1) The Ombudsman, as head of the Office, shall have the responsibility  
16 for leadership and management of the Office in coordination with the  
17 Department of Disabilities, Aging, and Independent Living and, as applicable,  
18 with any other agency carrying out the Ombudsman program.

19 (2) In addition to the functions set forth in 45 C.F.R. § 1324.13, the  
20 Ombudsman shall, personally or through representatives of the Office:

(A) analyze, comment on, and monitor the development and

implementation of federal, State, and local laws, rules, regulations, and other governmental policies and actions pertaining to the health, safety, welfare, and rights of residents with respect to the adequacy of long-term care facilities and ~~services~~ *long-term care* in the State;

1           (B) recommend any changes in such laws, rules, regulations,  
2 policies, and actions that the Office deems appropriate;

3           (C) facilitate public comment on the laws, rules, regulations,  
4 policies, and actions;

5           (D) provide leadership for the Office's statewide systemic advocacy  
6 efforts on behalf of residents, including coordinating systemic advocacy efforts  
7 implemented by representatives of the Office; and

8           (E) provide information to public and private agencies, the General  
9 Assembly, the media, and others regarding the problems and concerns of  
10 residents and the Ombudsman's recommendations regarding the problems and  
11 concerns.

12           (3) In addition to the functions set forth in 45 C.F.R. § 1324.13 and  
13 subdivision (2) of this subsection, the Ombudsman personally shall:

14           (A) establish or recommend policies, procedures, and standards for  
15 the Ombudsman program;

16           (B) require representatives of the Office to fulfill the duties set forth  
17 in 45 C.F.R. § 1324.19 in accordance with Ombudsman program policies and

1 procedures;

2 (C) refuse, suspend, or remove the designation of a representative of  
3 the Office or a local Ombudsman entity, or both, whenever the Ombudsman  
4 determines that the representative's or entity's policies, procedures, or  
5 practices are in conflict with the laws, policies, or procedures governing the  
6 Ombudsman program;

7 (D) establish training procedures for certification and continuing  
8 education for representatives of the Office; and

9 (E) investigate allegations of misconduct by representatives of the  
10 Office of the State Long-Term Care Ombudsman in the performance of  
11 Ombudsman program functions, responsibilities, and duties.

12 (2 4) Notwithstanding any provision of law to the contrary, the actions  
13 of the State Long-Term Care Ombudsman and representatives of the Office in  
14 carrying out the functions described in this subsection shall not be construed to  
15 constitute lobbying as defined in 2 V.S.A. § 261.

16 (b) In fulfilling the responsibilities of the ~~office~~ Office, the State Long-  
17 Term Care Ombudsman ~~may~~ and representatives of the Office of the State  
18 Long-Term Care Ombudsman are authorized to:

19 (1) Hire or contract with persons or organizations to fulfill the purposes  
20 of this chapter.

(2) Communicate and visit with any individual receiving long-term care,

provided that the Ombudsman or the representative of the Office shall obtain permission from the ~~individual or the individual's guardian or legal~~ resident or the resident representative to enter the ~~individual's~~ resident's home. ~~Toward that end, long-term~~ Long-term care facilities shall provide the State Ombudsman or the representative of the Office access to their facilities, and long-term care providers shall ensure the State Ombudsman and representatives of the Office have access to the individuals for whom they provide long-term care, as well as the name of and contact information for the resident representative, if any, as needed to perform the Ombudsman's functions and responsibilities or the duties of the representatives of the Office.

1           (3) Have appropriate access to review the medical and social records of  
2 an individual receiving long-term care ~~services~~ as required by 42 U.S.C.  
3 § 3058g(b), as the Health Insurance Portability and Accountability Act of 1996  
4 Privacy Rule, 45 C.F.R. Part 160 and 45 C.F.R. Part 164, subparts A and E,  
5 does not preclude release by covered entities of residents' private health  
6 information or other resident-identifying information to the Ombudsman  
7 program, including residents' medical, social, or other records, a list of  
8 resident names and room numbers, or information collected in the course of a  
9 State or federal survey or inspection process.

10           (4) Pursue administrative, judicial, or other remedies on behalf of  
11 individuals receiving long-term care, including access orders from a Superior

1 judge when access under subdivision (2) or (3) of this section has been  
2 unreasonably denied and all other reasonable attempts to gain access have been  
3 pursued and have failed.

4 (5) ~~Delegate to ombudsmen any part of the State Ombudsman's~~  
5 ~~authority.~~

6 (6) Adopt rules necessary to carry out the provisions of this chapter and  
7 those of the Older Americans Act relating to the Ombudsman ~~Program~~  
8 program.

9 (7)(6) Take such further actions as are necessary in order to fulfill the  
10 purposes of this chapter.

11 § 7505. COOPERATION OF STATE AGENCIES

12 (a) All State agencies shall comply with reasonable requests of the State  
13 Ombudsman for information and assistance and shall comply with the  
14 requirements for State agencies set forth in 45 C.F.R. § 1324.15.

15 (b) The Secretary of Human Services may adopt rules necessary to ensure  
16 that Departments within the Agency of Human Services cooperate with the  
17 Ombudsman's office. Cooperation shall include providing information  
18 regarding conditions and care in long-term care facilities.

19 § 7506. DISCLOSURE OF INFORMATION

20 ~~In the absence of either written consent by a complainant or resident of a~~  
21 ~~long-term care facility, or his or her guardian or legal representative, or court~~

1 ~~order, neither the State Ombudsman nor any ombudsman shall disclose the~~  
2 ~~identity of such person.~~

3 (a) In determining whether and to what extent to disclose files, records, and  
4 other information maintained by the Ombudsman program, the Ombudsman  
5 shall:

6 (1) have the sole authority to make or delegate determinations  
7 concerning the disclosure of files, records, and other information maintained  
8 by the Ombudsman program, and shall comply with Section 712(d) of the  
9 federal Older Americans Act, 42 U.S.C. § 3058g(d), in responding to requests  
10 for disclosure of files, records, and other information, regardless of the format  
11 of the file, record, or other information; the source of the request; or the  
12 sources of funding for the Ombudsman program;

13 (2) develop and adhere to criteria to guide the Ombudsman's discretion  
14 in determining whether to disclose the files, records, or other information; and

15 (3) develop and adhere to a process for appropriate disclosure of  
16 information maintained by the Ombudsman's office.

17 (b) Except as otherwise required by law, the Ombudsman program shall  
18 not disclose identifying information relating to any resident on whom the  
19 Ombudsman program maintains files, records, or information unless:

20 (1) the resident or resident representative communicates informed  
21 consent to the disclosure and consent is provided in writing or through the use

1 of auxiliary aids and services;

2 (2) the resident or resident representative communicates informed  
3 consent orally, visually, or through the use of auxiliary aids and services and  
4 the Ombudsman or a representative of the Office documents the consent  
5 contemporaneously in accordance with established procedures; or

6 (3) disclosure is required by court order.

7 (c) The Ombudsman program shall not disclose identifying information  
8 relating to any complainant on whom the Ombudsman program maintains  
9 files, records, or information unless:

10 (1) the complainant communicates informed consent to the disclosure  
11 and consent is provided in writing or through the use of auxiliary aids and  
12 services;

13 (2) the complainant communicates informed consent orally, visually, or  
14 through the use of auxiliary aids and services and the Ombudsman or a  
15 representative of the Office documents the consent contemporaneously in  
16 accordance with established procedures; or

17 (3) disclosure is required by court order.

18 § 7507. IMMUNITY

19 No civil liability shall attach to the ~~State~~ Ombudsman or any ~~ombudsman~~  
20 representative of the Office for good faith performance of the functions,  
21 responsibilities, or duties imposed by this chapter.

1 § 7508. INTERFERENCE AND RETALIATION

2 (a) A person who ~~intentionally hinders a representative of the Office acting~~  
3 ~~pursuant to~~ engages in willful interference as defined in this chapter shall be  
4 imprisoned not more than one year, or fined not more than \$5,000.00, or both.

5 (b) A person who takes discriminatory, disciplinary, or retaliatory action  
6 against an employee, resident, or volunteer of a long-term care facility, an  
7 entity that provides long-term care services through the Choices for Care  
8 program contained within Vermont's Global Commitment to Health Section  
9 1115 Medicaid demonstration, or an agency for any communication made, or  
10 information disclosed, to aid the Office Ombudsman's office in carrying out its  
11 functions, duties, and responsibilities, unless the original communication or  
12 disclosure was done maliciously or without good faith, shall be imprisoned not  
13 more than one year or fined not more than \$5,000.00, or both. An employee,  
14 resident, or volunteer of a long-term care facility, an entity that provides long-  
15 term care services through the Choices for Care program contained within  
16 Vermont's Global Commitment to Health Section 1115 Medicaid  
17 demonstration, or an agency may seek damages in Superior Court against a  
18 person who takes such action prohibited by this subsection.

19 § 7509. CONFLICT OF INTEREST

20 (a) ~~The Department by rule shall prohibit any ombudsman or immediate~~  
21 ~~family member of any ombudsman from having any interest in a long-term~~

1 ~~care facility or provider of long-term care which creates a conflict of interest~~  
2 ~~in carrying out the ombudsman's responsibilities under this chapter. The~~  
3 Department of Disabilities, Aging, and Independent Living and the  
4 Ombudsman shall identify organizational conflicts of interest that may impact  
5 the effectiveness and credibility of the Ombudsman's office and shall remove  
6 or remedy any such conflicts. Organizational conflicts include placement of  
7 the Ombudsman's office, or requiring that the Ombudsman or a representative  
8 of the Office perform conflicting activities, in an organization that:

9 (1) is responsible for licensing, surveying, or certifying long-term care  
10 facilities;

(2) is an association or an affiliate of an association of long-term care  
facilities or of any other entity that provides ~~services~~ *long-term care* through  
the Choices for Care program contained within Vermont's Global Commitment  
to Health Section 1115 ~~Medicaid~~ demonstration;

11 (3) has any ownership or investment interest in, or receives grants or  
12 donations from, a long-term care facility;

(4) has any officer or governing board member with any ownership,  
investment, or employment interest in a long-term care facility or an entity that  
provides ~~services~~ *long-term care* through the Choices for Care program  
contained within Vermont's Global Commitment to Health Section 1115  
~~Medicaid~~ demonstration;

1           (5) provides long-term care to residents;

2           (6) provides long-term care coordination or case management for  
3 residents;

4           (7) sets reimbursement rates for long-term care facilities;

5           (8) provides adult protective services;

6           (9) is responsible for eligibility determinations for patients regarding  
7 Medicaid or other public benefits;

8           (10) conducts preadmission screening for long-term care facility  
9 placements;

10          (11) makes decisions regarding admission or discharge of individuals to  
11 or from long-term care facilities; or

12          (12) provides guardianship, conservatorship, or other fiduciary or  
13 surrogate decision-making services for residents.

14          (b) To avoid individual conflicts of interest that may impact the  
15 effectiveness and credibility of the work of the Ombudsman's office, the  
16 Ombudsman shall develop and implement policies and procedures to ensure  
17 that neither the Ombudsman nor representatives of the Office are required or  
18 permitted to hold positions or perform duties that would constitute an  
19 individual conflict of interest. Individual conflicts of interest for an  
20 Ombudsman, representatives of the Office, and members of their immediate  
21 families include:

1           (1) direct involvement in the licensing or certification of a long-term  
2           care facility;

(2) ownership, operational, or investment interest in an existing or  
proposed long-term care facility or other entity that provides ~~services~~ *long-*  
*term care* through the Choices for Care program contained within Vermont's  
Global Commitment to Health Section 1115 ~~Medicaid~~ demonstration;

3           (3) an individual's employment by, or participation in the management  
4           of, a long-term care facility in this State or an individual's employment by the  
5           owner or operator of any long-term care facility in this State;

6           (4) receipt of, or the right to receive, directly or indirectly, remuneration  
7           under a compensation arrangement with an owner or operator of a long-term  
8           care facility;

9           (5) acceptance of gifts or gratuities of significant value from a long-term  
10          care facility or its management, or from a resident or resident representative of  
11          a long-term care facility in which the Ombudsman or a representative of the  
12          Office provides services, except if the individual has a personal relationship  
13          with a resident or resident representative separate from the individual's role as  
14          the Ombudsman or representative of the Office;

15          (6) acceptance of money or any other consideration from anyone other  
16          than the Ombudsman's office, or an entity approved by the Ombudsman, for  
17          the performance of an act in the regular course of duties of the Ombudsman or

1 of representatives of the Office, without the Ombudsman's approval;

2 (7) serving as a guardian, conservator, or in another fiduciary or  
3 surrogate decision-making capacity for a resident of a long-term care facility  
4 in which the Ombudsman or a representative of the Office provides services;

5 and

6 (8) providing services to residents of a long-term care facility in which  
7 an immediate family member resides.

8 (c) The State Ombudsman, consistent with the requirements of the Older  
9 Americans Act, shall be able to speak on behalf of the interest of individuals  
10 receiving long-term care and to carry out all duties prescribed in this chapter  
11 without being made subject to any disciplinary or retaliatory personnel or other  
12 action as a consequence of so doing. The Commissioner of Disabilities,  
13 Aging, and Independent Living shall establish a committee of no fewer than  
14 five persons, who represent the interests of individuals receiving long-term  
15 care and who are not State employees, for the purpose of ensuring that the  
16 ~~State Ombudsman program~~ is able to carry out all prescribed duties without a  
17 ~~conflict~~ free from conflicts of interest. The Commissioner shall solicit from  
18 this committee its assessment of the ~~State Ombudsman's~~ Ombudsman  
19 program's capacity to ~~perform~~ operate in accordance with this subsection and  
20 shall submit that assessment as an appendix to the report required under  
21 subdivision 7503(10) of this title. The Department, in consultation with this

1 committee, shall establish ~~rules which implement this subsection~~ a process for  
2 periodic review and identification of conflicts within the Ombudsman  
3 program.

4 § 7510. LEGAL ASSISTANCE

5 (a)(1) A contract for Ombudsman services shall ~~ensure legal representation~~  
6 ~~and advice to the State Ombudsman and regional ombudsmen operating~~  
7 ~~pursuant to the contract~~ require the Ombudsman program to secure adequate  
8 legal counsel that is available, has competencies relevant to the legal needs of  
9 the Ombudsman program and of residents, and is without conflict of interest,  
10 in order to:

11 (A) provide consultation and representation as needed to enable the  
12 Ombudsman program to protect the health, safety, welfare, and rights of  
13 residents; and

14 (B) provide consultation or representation, or both, as needed to  
15 assist the Ombudsman and representatives of the Office in the performance of  
16 their official functions, responsibilities, and duties, including complaint  
17 resolution and systems advocacy.

18 (2) ~~However~~ Notwithstanding the provisions of subdivision (1) of this  
19 subsection, if the State Ombudsman or regional ombudsmen representatives of  
20 the Office are State employees, the Office of the Attorney General shall  
21 provide legal representation and advice to the State Ombudsman and the

1 regional ombudsmen representatives of the Office.

2 (b) Legal representation of the Ombudsman program by the Ombudsman  
3 or a representative of the Office who is a licensed attorney shall not by itself  
4 constitute adequate legal counsel.

5 Sec. 2. 33 V.S.A. § 6903 is amended to read:

6 § 6903. REPORTING SUSPECTED ABUSE, NEGLECT, AND  
7 EXPLOITATION OF VULNERABLE ADULTS

8 (a) Any of the following, other than a crisis worker acting pursuant to  
9 12 V.S.A. § 1614 and the State Long-Term Care Ombudsman or a  
10 representative of the Office, as defined in section 7501 of this title, who knows  
11 of or has received information of abuse, neglect, or exploitation of a  
12 vulnerable adult or who has reason to suspect that any vulnerable adult has  
13 been abused, neglected, or exploited shall report or cause a report to be made  
14 in accordance with the provisions of section 6904 of this title within 48 hours:

15 \* \* \*

16 ~~Sec. 3. EFFECTIVE DATE~~

17 ~~This act shall take effect on July 1, 2017.~~

*Sec. 3. 33 V.S.A. chapter 69, subchapter 3 is redesignated to read:*

*Subchapter ~~3~~ 4. Vermont Vulnerable Adult Fatality Review Team*

*Sec. 4. 33 V.S.A. chapter 69, subchapter 3 is added to read:*

*Subchapter 3. Protecting Against Financial Exploitation*

§ 6951. DEFINITIONS

As used in this subchapter:

(1) “Agent” shall have the same meaning as in 14 V.S.A. § 3501.

(2) “Guardian” means a person appointed to serve as the guardian for a vulnerable adult pursuant to the process established in 14 V.S.A. chapter III or in 18 V.S.A. chapter 215.

(3) “Financial exploitation” means:

(A) using, withholding, transferring, or disposing of funds or property of a vulnerable adult, without or in excess of legal authority, for the wrongful profit or advantage of another;

(B) acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress, or fraud; or

(C) the act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or financial advantage of another.

(4) “Vulnerable adult” shall have the same meaning as in section 6902 of this chapter.

§ 6952. CIVIL ACTION FOR RELIEF FROM FINANCIAL  
EXPLOITATION

(a) Right of action. A vulnerable adult or his or her agent or guardian may bring an action in the Civil Division of the Superior Court pursuant to

this section for relief against a natural person who, with reckless disregard or with knowledge, has engaged in the financial exploitation of the vulnerable adult. An action under this section shall be dismissed if the court determines the vulnerable adult is capable of expressing his or her wishes and that he or she does not wish to pursue the action.

(b)(1) Remedies. If the court finds that financial exploitation of a vulnerable adult has occurred, the court shall grant appropriate relief to the vulnerable adult, which may include money damages, injunctive relief, reasonable costs, attorney's fees, and equitable relief.

(2) If the financial exploitation was intentional, the court may grant exemplary damages not to exceed three times the value of economic damages.

(c) Effects on other parties. No relief granted or otherwise obtained pursuant to this section shall affect or limit in any way the right, title, or interest of a good faith purchaser, mortgagee, holder of a security interest, or other party who obtained an interest in property after its transfer from the vulnerable adult to the natural person who engaged in financial exploitation. No relief granted or otherwise obtained pursuant to this section shall affect any mortgage deed to the extent of the value provided by the mortgagee.

(d) Statute of limitations. The limitations period imposed by 12 V.S.A. § 511 shall apply to all actions brought pursuant to this subchapter.

§ 6953. OTHER RELIEF STILL AVAILABLE

Nothing in this subchapter shall be construed to limit the availability of other causes of action or relief at law or equity to which a vulnerable adult may be entitled under other State or federal laws or at common law.

*Sec. 5. EFFECTIVE DATES*

(a) Secs. 1 and 2 (State Long-Term Care Ombudsman) shall take effect on July 1, 2017.

(b) Secs. 3 and 4 (protecting against financial exploitation) and this section shall take effect on passage.